



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fishermen's Boat Shop, Inc.
File: B-223366
Date: October 3, 1986

DIGEST

1. Dismissal for failure to furnish agency copy of protest within 1 day of filing at GAO as required by GAO Bid Protest Regulations, 4 C.F.R. § 21.1(d)(1986), is not warranted where agency is already on notice of bases for protest through prior agency protest, and agency is able to submit protest report within time limit prescribed under Competition in Contracting Act, 31 U.S.C. § 3553(b)(2)(A) (Supp. III 1985)
2. An offeror is responsible for delivering its best and final offer to the proper place at the proper time. Late offers will be considered only as provided for in the solicitation.
3. Late best and final offer, received by the agency's central mail depot 25 minutes before the established time for receipt of offers in an envelope not clearly identifying contents as an offer, properly was rejected as late because receipt at the agency's mail depot does not constitute receipt at the designated contracting facility.
4. Recovery of proposal preparation costs and the cost of filing and pursuing the protest is denied where a protest is denied in part and dismissed in part. Recovery of lost profits is not permitted under any circumstances.

DECISION

Fishermen's Boat Shop, Inc. (FBS) protests the rejection, as late, of its best and final offer (BAFO) under Request for Proposals (RFP) No. N00167-85-R-0065 issued by the Department of the Navy (Navy), David Taylor Naval Ship R&D Center (R&D Center) for a Large Scale Vehicle Support Barge.

FBS contends that its BAFO was timely delivered; that it should have been awarded the contract based on its low, technically acceptable offer; that the awardee's proposal did

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not comply with the RFP's requirements; and that the Navy engaged in technical leveling by providing FBS's proprietary data to other offerors in the RFP amendment. FBS has requested proposal preparation and protest costs and the award of lost profits.

The protest is denied in part and dismissed in part.

The RFP, issued on July 1, 1985, was amended five times. Nine proposals were submitted in response to the RFP. FBS's low offer was among the eight proposals determined to be in the competitive range. By letter of April 8, 1986, FBS was requested by the Contracting Officer (CO) to respond to 16 questions concerning its proposal. FBS was advised that its BAFO should be submitted "so as to arrive in this office" by 3:00 p.m., Eastern Standard Time, on April 30, 1986. The CO's letter advised that the date was established in accordance with, and FBS's reply was subject to, the Federal Acquisition Regulation (FAR) provision, included in the RFP, entitled "Late Submissions, Modifications, and Withdrawals of Proposals," 48 C.F.R. § 52.215-10 (1985). The letter further advised that the BAFO should be submitted in a sealed envelope, addressed to "David Taylor Naval Ship R&D Center, Code 5321, Ann Stuart, Bethesda, MD 20084-5000." With respect to hand-carried offers, the RFP required delivery to the R&D Center's Building 121, room 214. In addition, the RFP included the FAR provision, 48 C.F.R. § 52.215-9, which required that offers be submitted in sealed envelopes addressed to the office specified in the solicitation and showing the time specified for receipt, the solicitation number, and the name and address of the offeror.

At the April 30, 1986 closing date, BAFOs were received from seven of the eight offerors in the competitive range. FBS's BAFO was sent from Everett, Washington by U.S. Postal Service Express Mail, at 4:17 p.m. on April 29, 1986, and was time/date stamped at the Navy's central mail depot at Eads Street, Arlington, Virginia, at 2:35 p.m. on April 30, 1986, 25 minutes before the deadline for receipt of BAFOs. The depot delivers mail to naval facilities twice a day, around 8 a.m. in the morning and 1:30 p.m. in the afternoon. Since FBS's BAFO had arrived after the depot's afternoon mail truck had departed, it was not received by the R&D Center until 8:45 a.m. on May 1, 1986, well after the established time for receipt of BAFOs. The BAFO was rejected as late. FBS filed a protest with the CO, and after receiving the Navy's final decision rejecting its late BAFO, FBS filed this protest with our Office.

Preliminarily, the Navy argues that FBS's protest should be dismissed because the protester failed to provide the CO with a copy of the protest within 1 day of filing with GAO as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1986).

The regulation stems from the requirement imposed on the procuring activity by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(b)(2)(A) (Supp. III 1985), to furnish our Office with a report on a protest within 25 days. While we may dismiss protests where the procuring agency has been prejudiced by the protester's noncompliance with this procedural requirement, 4 C.F.R. § 21.1(f), we do not do so automatically. Rather, we consider whether the agency otherwise had knowledge of the basis for the protest and was able to submit its report on the protest within the CICA time limit. CDI Marine Co., B-219934.2, Mar. 12, 1986, 86-1 CPD ¶ 242; C.A. Parshall, Inc., B-220650 et al., Jan. 14, 1986, 86-1 CPD ¶ 38.

FBS initially raised virtually the same contentions in its agency protest, so the Navy was aware of the bases of the protest at the time the protest was filed with our Office. Additionally, despite the 5-day delay in receiving a copy of the protest, the Navy was able to file its protest report in a timely manner. Under the circumstances, dismissal of the protest would not be warranted.

FBS contends that the Navy violated the FAR, 48 C.F.R. § 52.215-10(e), by not recognizing the mail depot time/date stamp as evidence of the time of receipt of its BAFO. The protester asserts that the mail depot's time/date stamp should be determinative of the time of arrival because all mail addressed to the Zip Code, 20084-5000, is forwarded to the depot by the U.S. Postal Service and there is no direct delivery to the R&D Center. In support of its argument, FBS cites the views of two U.S. Post Office employees that the Eads Street mail depot is "the authorized agent" of the R&D Center and that delivery to the depot constituted official receipt by the contracting officer. FBS also argues that since the procurement involves negotiations, not sealed bids, there would be no prejudice to other offerors if its proposal were considered because the sealed envelope containing FBS's BAFO was in the possession R&D Center officials prior to the deadline for BAFOs.

The Navy contends that FBS's BAFO was late because receipt at the Navy's mail depot does not constitute receipt at the receiving location that was clearly designated in the RFP by building and room number. The Navy states that the mail depot

is not connected with the R&D Center and merely functions as a clearinghouse for mail addressed to various facilities within the Washington D.C. area. Additionally, the Navy states, and FBS has not denied, that the protester's BAFO envelope was not clearly marked as an offer, as required by the RFP.

We have consistently held that an offeror has the responsibility to assure timely arrival of its proposal and must bear the responsibility for its late arrival unless specific conditions of the solicitation for consideration of late proposals are met. Hubbs-Sea World Research Institute, B-210579, Mar. 1, 1983, 83-1 CPD ¶ 193. In this case, the standard late proposal clause, included in the RFP, permits consideration of a late proposal if it was sent by registered or certified mail not later than the fifth day before the closing date for proposals. Additionally, a late proposal may be considered if it was sent by mail and it is determined that late receipt was due solely to government mishandling after receipt at the government installation. 48 C.F.R. § 52.215-10(a)(1) and (2).

We have held that express mail is not the equivalent of registered or certified mail and thus does not fall within the late proposal exceptions. Jack Burney, B-218426, Apr. 24, 1985, 85-1 CPD ¶ 468. In any event, FBS mailed its BAFO less than 1 day, rather than at least 5 days, prior to the BAFO closing date. Therefore, FBS's BAFO would have been properly rejected as late even if express mail were treated as the equivalent of certified or registered mail. Id.

Contrary to FBS's contention, receipt at the mail depot does not constitute receipt by the CO, and the Navy properly did not use the mail depot's time/date stamp to determine the time of receipt. The RFP specified that offers must be in a properly identified envelope and received at the designated R&D Center address or handcarried to the depository located in the R&D Center's Building 121, room 214, by the established time. On numerous occasions, we have held that bids or offers were properly rejected as late where they were delivered to an intermediary stop prior to the designated time, but received late at the established location. See, e.g., Consolidated Marketing Network, Inc., B-217256, Mar. 21, 1985, 85-1 CPD ¶ 330, (the bid that was in an envelope not clearly identifying its contents as a bid was delivered by a commercial carrier to a central mail facility 5 minutes before bid opening); Chemical Waste Management, Inc., B-215382, Sept. 10, 1984, 84-2 CPD ¶ 274, (a properly identified proposal was delivered by commercial carrier to the loading dock of a federal center); Motorola, Inc., B-219592, July 24, 1985, 85-2 CPD ¶ 84, (a proposal sent by commercial carrier,

and therefore regarded as hand-carried, was received at the designated mailing address on time but arrived late at the location designated for hand-carried offers.

Since receipt at the mail depot does not constitute receipt at the designated location, the BAFO was properly rejected as late. As for FBS's assertion that acceptance of its late BAFO would not prejudice other offerors because the BAFO envelope was in the possession of the mail depot prior to the designated time, the late proposal rules exist because the manner in which the government conducts its procurements must be subject to clearly defined standards that apply equally to all so that fair and impartial treatment is ensured. Permitting one offeror to deliver its proposal after the established closing date would lead to confusion and unequal treatment of offerors, and thereby would tend to subvert the competitive system. Jack Burney, supra.

FBS also contends that it should have been awarded the contract based on its low, acceptable offer. While the record shows that FBS's initial offer was low, the contracting officer's price negotiation memorandum states that FBS's initial proposal was reevaluated and found unacceptable for award purposes because the 16 unanswered questions posed to FBS during discussions were significant. See Data Resources, Inc., B-220079, 65 Comp. Gen. ____ (1985), 85-2 CPD ¶ 670.


Accordingly, the Navy properly did not consider FBS's proposal for award.

FBS's protest that Amendment No. 4 to the RFP incorporated five proprietary change considerations that were submitted in FBS's initial proposal is untimely. Under GAO Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. Initial proposals were submitted by the September 13, 1985, closing date. Amendment No. 4 was issued on January 31, 1986, and required revised proposals, after a subsequent amendment (No. 5), by February 26, 1986. FBS's protest alleging the incorporation of its proprietary data in the Amendment No. 4 was filed with the agency on May 15, 1986 and with our Office on June 11, 1986, well beyond the closing date for revised proposals. This portion of the protest is therefore dismissed as untimely.

Because of our conclusion that FBS is not in line for contract award, FBS is not an interested party in this procurement, and its allegation that the awardee's proposal did not comply with the RFP's requirements will not be considered. See 4 C.F.R. § 21.0(a) and § 21.1(a).

The protest is denied in part and dismissed in part.

The protester has requested proposal preparation costs, the costs of filing and pursuing its protest and the award of lost profits. In view of our decision denying in part and dismissing in part FBS's protest, its claims for proposal preparation and protest costs are denied. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667. With respect to FBS's claim for lost profits, our Office has recognized the general rule that anticipated profits may not be recovered even in the presence of wrongful action. Smoke Busters, B-219458, Nov. 1, 1985, 85-2 CPD ¶ 501.

for 
Harry R. Van Cleve
General Counsel